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In the Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

Petitioners,

v.

MOUNT LAUREL TOWNSHIP,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

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Our petition presents a pressing question left unresolved in *Kelo*—whether a municipality must engage in "comprehensive" and "deliberat[e]" planning in order to receive the "great respect" that is owed to local government "in discerning local public needs." 545 U.S. at 482, 484; *id.* at 493 (Kennedy, J., concurring). Mount Laurel's actions in taking MiPro's property without planning, and the trial court's finding that the Township acted with a pretextual motive, make this the perfect example of the "hypothetical" case referred to by the *Kelo* majority, where the "unusual exercise of government power" raises "suspicion" of improper purpose. *Id.* at 487 & n.17. It is the "sort of cas[e]" described by Justice Kennedy, where the "procedures employed" are "so prone to abuse" that the taking does not pass constitutional muster. *Kelo*, 545 U.S. at 493.

Although the proper "circumstances" were not "present" in *Kelo* to elaborate on the procedural requirements of the Fifth Amendment (545 U.S. at 493 (Kennedy, J., concurring)), they *are* present here. This case presents the "paradigmatic illustration of the absence of planning." NAHB Am. Br. 8. The Supreme Court of New Jersey gave Mount Laurel a green light to condemn MiPro's property for open space without plans or studies documenting a need for the land, without particular standards to determine whether acquisition was proper, without consulting its Planning Board, and with a pretextual rationale for the taking. This case provides the Court an opportunity to address the limits of the deference due local decisions to take private property—an issue as to which courts are deeply divided—and to reaffirm the necessity of "elaborate procedural requirements that facilitate review of the record and inquiry into the

city's purposes." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

The importance of acting now to clarify that the decision of the Supreme Court of New Jersey is inconsistent with *Kelo* and the Fifth Amendment can hardly be overstated. The number of municipal takings of private property has skyrocketed after *Kelo*; from June 2005 to June 2006 alone, more than 5,700 actual or threatened economic development takings occurred. AFBF Am. Br. 4-5; see DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (June 2006), available at http://www.castlecoalition.org/publications/floodgates/index.html. Briefs of *amici curiae* representing builders, farmers, and real estate managers and owners attest to the critical importance of defining the judiciary's responsibility to check otherwise untethered eminent domain power. Lower courts must be provided "guidance as to the location of the nether end of the public use spectrum—i.e., the point at which broad deference to local decisions ends and the 'skeptical eye' comes into play." NAHB Am. Br. 7.

Mount Laurel's perfunctory opposition does not address the compelling reasons to grant certiorari set forth in the petition and *amicus* briefs. To the contrary, the Township makes significant factual concessions that show this case is appropriate for the Court's review. The Township does not dispute that its real goal in acquiring MiPro's property was to "[s]ave" the land "[f]rom [d]evelopment" and "reduc[e] the number of residential units in the Township" (Pet. 4; Pet. App. 31a-32a); that Township officials did not consult with the Planning Board to determine, before condemning MiPro's property, whether acquisition was consistent with its open

space goals (Pet. 4-5; Pet. App. 43a-44a); that no studies were done to document the Township's need for additional space or the suitability of MiPro's land to meet open space goals (Pet. 5-6; Pet. App. 32a); or that the Master Plan was amended only after the initiation of this litigation, and then only to make blanket provision that "all potential parcels" in the Township not yet developed were "locationally suitable for permanent open space" (Pet. 5; Pet. App. 14a). See S. Ct. Rule 15.2 (respondent has obligation to correct in its opposition any perceived factual misstatements in the petition).

The Township also makes significant concessions as to the controlling legal principles. It does not refute the importance of a "carefully formulated" "integrated development plan" to the Court's analysis in *Kelo*. 545 U.S. at 473-474 & n.2, 483; *id.* at 493 (Kennedy, J., concurring); *id.* at 502, 504 (O'Connor J., dissenting). It does not dispute that this Court has repeatedly found the Fifth Amendment to require a procedurally sound public use determination. *Berman* v. *Parker*, 348 U.S. 26, 29, 34-35 (1954); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 232-234, 242 (1984). It does not seriously challenge the necessity of procedural limits to the exercise of eminent domain following *Kelo*. Most notably, it does not deny that courts are splintered in their interpretation of the procedural requirements that govern the taking of land—a split that we showed extends to at least four federal circuits and seven states.

As a result, Mount Laurel is left with few arguments against certiorari, none of them persuasive. It asserts that petitioners have waived any Fifth Amendment argument; claims that petitioners are urging the Court to engage in fact finding; pretends that the issue presented is

whether a State may preserve open space; and contends that the constitution permits government to take private property in an *ad hoc* manner. Each of these arguments is easily refuted.

I. Petitioners Have Not Waived Their Fifth Amendment Argument.

Without referencing the record, discussing the proceeding below in any substantive manner, or addressing New Jersey waiver law, the Township asserts that MiPro's Fifth Amendment argument "has not previously been asserted or argued in any pleadings or subsequent briefs filed in any New Jersey court." Opp. 1. In fact, MiPro explicitly argued in the Supreme Court of New Jersey that the Township's *ad hoc* and pretextual taking of its property violated the Fifth Amendment's procedural guarantees. Citing *Kelo*, MiPro argued that the Appellate Division "ignore[d] the constitutional requirements of the Fifth Amendment of the United States Constitution." Pet. for Certification, N.J. Sup. Ct., at 5. Developing its constitutional argument, MiPro contended, citing *Kelo*, that a condemnation must be "fully planned" to satisfy the "Fifth Amendment," but that "no proof of any planning by the Township exists." *Id.* at 15-16. The National Association of Home Builders, participating as *amicus curiae* in the state supreme court, further elaborated this argument. It submitted that, under *Kelo*, the "lack of adequate, comprehensive planning" deprived the Township's actions of "a rational basis" and made clear that "the Township [was] wielding the sovereign's power not for a proper public purpose or a proper public use." NAHB Am. Br., N.J. Sup.Ct., at 2-6.

MiPro's raising of the federal issue in the Supreme Court of New Jersey preserves it for this Court's review.

The Township was afforded an opportunity to address the federal question on its merits, as required by New Jersey law. *Walker Rogge, Inc.* v. *Chelsea Title & Guar. Co.*, 603 A.2d 557, 560 (N.J. Super. App. Div. 1992) (issue was not waived where opposing party had opportunity to respond "on [the] merits"); see also *Webb* v. *Webb*, 451 U.S. 493, 500 (1981) (waiver doctrine requires that parties had a fair opportunity to address the federal question). Instead of arguing to the state Supreme Court that petitioners had waived the federal issue (*Walker Rogge,* 603 A.2d at 560), the Township submitted that *Kelo* does not require comprehensive planning in all cases, misreading this Court's opinion as merely requiring compliance with state land use statutes. Mount Laurel Opp. to NAHB Am. Br. at 7-10. The Township also maintained that it had engaged in the extensive planning required by *Kelo*. *Id.* at 11-13; see also State of New Jersey Am. Br. at 8-9 (arguing that *Kelo* permits municipal condemnation of property in furtherance of the public purpose of preventing development).

That the Supreme Court of New Jersey chose not to address petitioners' Fifth Amendment argument, despite briefing on the subject by both parties and *amici*, is not determinative of the waiver issue. See *Webb*, 451 U.S. at 501 (where state court was "apprised of the nature or substance of the federal claim," the issue is preserved even if it is not "addressed" by that court); *Beck* v. *Alabama*, 447 U.S. 625, 630 n.6 (1980) (state supreme court's "failure to address petitioner's federal constitutional claims" cannot be construed "as a determination that petitioner had waived those claims" where "[i]t is clear that petitioner did present his federal claims in some fashion" to that court). Where an issue has been

briefed it is preserved for review. See *Walker Rogge*, 603 A.2d at 560; *Liebling* v. *Garden State Indem.*, 767 A.2d 515, 525 (N.J. Super. App. Div. 2001).

To the extent that Mount Laurel suggests that the federal issue also should have been raised in the Appellate Division or state trial court, that argument is unavailing. This Court decided *Kelo* only after briefing had been completed and oral argument held in the Appellate Division. In similar circumstances, this Court has found a grant of certiorari to be proper. *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (addressing *Maine* v. *Thiboutot*'s applicability to the facts of the case, "despite the failure of respondents to raise it here or below," because "[t]his litigation began long before that decision"); *Rosenblatt* v. *Baer*, 383 U.S. 75, 77 (1966) (granting certiorari to decide whether respondent was a "public official" under *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), despite parties' failure to raise the issue in state court); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 678 (1930); see also *Standard Indus., Inc.* v. *Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (Black, J., dissenting from per curiam opinion) (the Court "ha[s] frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law" (citing cases)).

Furthermore, the Appellate Division acknowledged *Kelo*—decided after briefing and argument but before the Appellate Division's opinion issued—and attempted to apply it to the facts of this case. Pet. App. 23a (misciting *Kelo* for the proposition that acquiring land for the "public purpose" of conserving open space is a legitimate "public use," even if the Township had an ulterior motive in condemning the property). The Appellate Di-

vision's effort to address *Kelo*'s implications for this case makes that issue especially appropriate for review. See *Weeden* v. *City Council of City of Trenton*, 917 A.2d 815, 821 n.3 (N.J. Super. App. Div. 2007) (where an issue is "fairly presented" in a judicial opinion, it may form the basis of a valid appeal); *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979) (where state court decided the federal issue, objection that it was not preserved was "'untenable'").[1]

In fact, even if petitioners had waived their Fifth Amendment objection to the *ad hoc* and pretextual taking of MiPro's property by the Township—which they did not—it would still be proper for this Court to grant certiorari to decide the recurring question of what constitutional protections are due a private party under these circumstances. New Jersey recognizes an exception to general waiver principles where the "questions so raised on appeal * * * concern matters of great public interest." *Nieder* v. *Royal Indem. Ins. Co.*, 300 A.2d 142,

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[1] Further, MiPro fully briefed the substance of its federal constitutional argument in the lower state courts. See *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (waiver principles require only "that the lower court be fairly put on notice as to the substance of the issue"). It argued that a municipality may not take land for a pretextual purpose, but must act in conformance with minimum procedural guarantees, including a comprehensive planning process. See MiPro Br., App. Div. at 13 ("the Township has been unable to demonstrate that it undertook careful steps to determine its open space needs, devised a plan to fulfill those needs and identify a particular property as necessary for open space or recreation in an under-served area of the Township"); *id.* at 44 ("The State advocates utilization of a local and regional assessment of open space needs, but clearly that was not done by Mount Laurel"); Mount Laurel Reply, App. Div. at 12 (claiming that Township did act pursuant to a comprehensive planning process).

145 (N.J. 1973). The questions raised by this case are certainly of that caliber. The decision of the Supreme Court of New Jersey has great practical importance across the country, particularly in light of the increased and increasingly-questionable use of condemnation after *Kelo*. BERLINER, *supra*; DAVID DANA & THOMAS MERRILL, PROPERTY: TAKINGS 207 (2002). Left uncorrected, the decision below undermines the Fifth Amendment's guarantee of a procedurally-sound public use determination, only a year after members of both the majority and the dissent in *Kelo* emphasized the dispositive role the constitution plays in "impos[ing] * * * meaningful judicial limits on the government's power to condemn any property it likes." *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring); *id.* at 473-474; *id.* at 502, 504 (O'Connor, J., dissenting). If the public use requirement of the Takings Clause is to retain any meaning after *Kelo* this Court must address petitioners' constitutional argument on its merits.

II. Mount Laurel's Other Arguments Against Certiorari Are Meritless.

1. The Township misstates the issue presented as "whether a densely populated State may take action to preserve open space." Opp. 9. But petitioners do not dispute that a municipality may "take action to preserve open space," or condemn land for any other public use, provided that it complies with constitutional requirements. *Id.* at 9-10. In particular, the condemnation "must be preceded by careful municipal study of the kind discussed in *Kelo*," which was "concededly absent here." NAHB Am. Br. 10. Mount Laurel does not even pretend to have engaged in that sort of planning here.

2. The Township asserts that petitioners improperly ask this Court to "make a detailed redetermination of facts." Opp. 9. But the trial court, on the basis of "overwhelming" evidence, made the factual determinations in this case—findings that Mount Laurel says nothing about in its opposition. The trial court found that the Township had "no study or report" that indicated a need for additional open space, made no determination regarding the suitability of the MiPro parcel for acquisition as open space, and proffered an "open space" rationale for the taking that was pretextual, disguising an ulterior purpose of thwarting residential development. Pet. App. 43a-46a. Without disturbing these factual findings, the Appellate Division and Supreme Court held that the lack of planning did not preclude exercise of the Township's power of eminent domain. It is this *legal* determination—and the assumption that the "public use" condition does not operate as a meaningful limit on the takings power—that MiPro asks this Court to review.

3. The Township contends it had a "comprehensive plan" based on New Jersey preservation statutes. Opp. 6-9. It does *not* argue that it had a "carefully formulated" "integrated development plan" anything like that praised in *Kelo*. 545 U.S. at 473-474 & n.2, 483. Admission to the New Jersey Green Acres Program merely requires a municipality to create an Open Space Recreation Plan (OSRP) and allow the public to attend meetings concerning the OSRP. Opp. 7-8. The relevant statutes do not, however, require a good faith planning process, complete with public hearings, supporting studies, and the lack of a pretextual motive—the "foundation[s] of a constitutionally sufficient exercise of eminent domain." AvalonBay Am. Br. 7. Indeed, the Township concedes

that it did not conduct studies of its need for MiPro's property and that its decision to include MiPro's property on the OSRP was made in reaction to litigation in this case. The Township instead argues that simply because it "followed State law" (Opp. 9), its *ad hoc*, pretextual taking should be regarded as constitutional.

That reasoning would impose no constraints on the procedural requirements adopted by a State. It reflects an extraordinarily broad interpretation of municipal authority at odds with this Court's modern precedents. It runs afoul of the Court's opinion in *Kelo,* which emphasized the "need for honest municipal planning." NAHB Am. Br. 10. And far from providing a reason to uphold the decision of the Supreme Court of New Jersey, the Township's reasoning demonstrates the importance of granting review. "If eminent domain may be utilized without a plan, and notwithstanding pretext," then "there is no telling where that [would] take us." AvalonBay Am. Br. 10-11 (quoting G. Kanner, *What Does It Take to Recognize Bad Faith*, JUST COMPENSATION, Dec. 2006, at 12). In the absence of substantive limits on the meaning of "public use," "basic standards of procedural fairness," guaranteed by the Fifth Amendment, are the "only protection * * * left against unwarranted or ill-advised takings." AFBF Am. Br. 3. The Township, like the Supreme Court of New Jersey, "cavalierly swe[eps] aside" these important safeguards (*id.* at 12) and makes necessary this Court's immediate intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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